IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO. 1 OF 2005

IN

SUIT NO. 574 OF 2004

Rasiklal Manikchand Dhariwal
Karta of M/s. R.M. Dhariwal
(HUF) & Ors. .. Plaintiff.

vs.

Kishore Washwani .. Defendant

And

Nitesh Ashok Wadhwani .. Respondent.
(Proposed Deft.No.2)

Mr. Ravi Kadam with S.A. Diwan i/by M/s. Mulla & Mulla CB & C for Plaintiff.

Mr. V.V. Tulzapurkar, Sr. Counsel, with Mr. Virag Tulzapurkar and Hemang J. Engineer i/by M/s. Gordhandas & Fozdar for Defendant.

Mr. I.M. Chagla, Sr. Counsel, with Janak Dwarkadas, Sr. Counsel, S.Purohit i/by V.A. Bhagat for proposed Defendant/Respondent.

CORAM : S.U. KAMDAR,J.

DATE : 2nd FEBRUARY, 2005

ORAL JUDGMENT :

1. The present chamber summons has been taken out by the plaintiff under order 6 rule 17 of the Civil Procedure Code for carrying out amendment to the plaint.

2. Some of the material facts in the present case briefly stated are as under :-

3. Originally a suit was filed by the plaintiff against Mr. Kishore Washwani in his capacity as the proprietor of a business known as Messrs M.S.S. Food Products. The said suit was filed for the purpose of perpetual order and injunction restraining the defendant from passing off or selling or attempting to sell or offering for sale or from distributing or attempting to distribute or dealing in or attempting to deal in Supari Mix or goods of similar description bearing mark "Malikchand" or any mark or label identical with and/or deceptively similar to the plaintiffs' Trade Mark "Manikchand". Further reliefs are sought of accounts and/or other consequential and incidental reliefs. The said suit came to be filed on 3.2.2004 and an ex-parte application was moved for interim orders being Notice of Motion No. 606 of 2004. However, during the pendency of the suit, the plaintiffs were informed that the trade mark

"Malikchand" has been assigned by the defendant in favour of his nephew Mr. Nitesh Ashok Wadhwani of Messrs M.S.S. Food Products. The plaintiffs thereafter withdrew the said notice of motion with liberty to take out fresh proceedings.

4. In or about March, 2004, the said Nitesh Wadhwani, the proposed Defendant No. 2 filed a suit being Civil Suit No. 8A of 2004 before the District Judge Mandaleshwar in the State of Madhya Pradesh. The said suit is filed by the proposed Defendant No. 2 against the plaintiff herein inter alia claiming that the plaintiff are passing off the goods by using the trade mark "Manickchand" which is deceptively similar trade mark to that of the proposed defendant no. 2 i.e. Malikchand. In the said suit it has been claimed that the proposed defendant no. 2 has prior user of their mark "Malikchand" in relation to their goods which are tobacco products and by virtue of such prior user they are entitled to various reliefs in the suit. An ad-interim application was moved on 16.3.2004 ex-parte in the said Mandaleshwar Court and the said Court granted an ad-interim order against the plaintiff herein. Against the said order on 22.3.2004, the plaintiff filed an appeal before the High Court of Madya Pradesh, Indore Bench which was disposed of by directing the trial Court to hear the interim injunction application expeditiously. On 31.3.2004, the District Judge of Mandaleshwar

confirmed the interim injunction against the plaintiff herein and an appeal preferred therefrom by the plaintiff in the High Court of Madhya Pradesh was dismissed on 11.5.2004. I am informed that against the said order of the Indore Bench of Madhya Pradesh High Court, a Special Leave Petition has been filed in the Apex Court being Special Leave to Appeal (Civil) No. 14862 of 2004. The said SLP has been heard finally and orders thereon are awaited.

5. In the meantime the plaintiffs have sought to move the present application for amendment of the plaint under order 6 rule 17 of the Civil Procedure Code inter alia seeking to add the respondent being proposed defendant no. 2 as party defendant no. 2 to the suit and also sought various other amendments inter alia seeking to amend substantial part of the plaint. One of the amendment which is sought to be inserted and covered by paragraph 5 and 6 of the plaint in which the plaintiffs are seeking to put forward a case that they have conceived and adopted the trade mark in relation to tobacco products consisting of bidi and commenced using the same on a commercial scale in or about 1958 and it is their case that the plaint erroneously indicates that the mark was conceived and adopted in 1961.

6. The other amendments which are sought to be added in the suit pertaining to the addition of the

defendant no. 2 and consequential reliefs of passing off against the proposed 2nd defendant. It is the case of the plaintiff that their trade mark application has been accepted and now the plaintiffs are the proprietor of the registered trade mark "MANIKCHAND" and, therefore, they are entitled also to seek a relief on the basis of their registered trade mark proprietary right in the mark "MANIKCHAND" and also entitled to seek injunction for restraining the defendants and the proposed defendant from infringing their mark.

7. The learned counsel for the plaintiffs Mr. Ravi Kadam has inter alia contended that the amendment has been necessitated for two basic reasons. Firstly, to incorporate subsequent events which have transpired subsequent to the filing of the suit. It has ben contended by the learned counsel for the plaintiff that it is only after the filing of the suit they came to know that the defendant has assigned the right, title and interest in the trade mark ’MANIKCHAND" in favour of the proposed defendant no. 2. It is the case of the plaintiff that the plaintiff had sued the defendant because the defendant had made representation in the Trade Mark Journal that he is the sole proprietor of the trade mark. It has been brought to my notice by the plaintiff that even in 2004 the defendant has been making representation that the said mark belongs to

him and he is the sole proprietor though purportedly the said mark has ben assigned in favour of the proposed defendant no. 2 as far back as 1966. The learned counsel has drawn my attention to a statement filed before the Trade Mark Registry on 13.5.2004 where the defendant has described himself as the sole proprietor of M.S.S. Food Products and has claimed right in respect of the trade mark "MANIKCHAND". The learned counsel for the plaintiff has contended that the defendant as well as the proposed defendant are conveniently claiming inter se rights in the trade mark as and when convenient by the respective parties and thus it is necessary that the proposed defendant no. 2 should be added as the party defendant to the suit. It has been further contended by the learned counsel for the plaintiff that the said proposed defendant has filed a suit in the Mandleshwar Court in the State of Madhya Pradesh and the said suit has been filed subsequent to the filing of the present suit claiming rights in the said trade mark and thus it has become increasingly necessary to implead the said defendant no. 2 to the present suit. In so far as other amendments are concerned, the learned counsel for the plaintiff has contended that the registration of the trade mark in favour of the plaintiff has been subsequent to the filing of the suit and in view of the registration of the said trade mark "MANIKCHAND" the plaintiff become entitled to claim reliefs on the basis of registered

proprietor of the said trade mark including the relief on the basis of the action for infringement. Secondly, the amendment has become necessary to correct the error which has crept in their suit, the learned counsel for the plaintiff has contended that erroneously it was mentioned in the plaint that they have conceived the said mark "Manikchand" first time in 1961 though in fact the plaintiff was using the said trade mark "MANIKCHAND" right from 1958 though only in relation to bidi as one of the tobacco products. The learned counsel for the plaintiff has submitted that the said error of the company was noticed subsequent to the filing of the suit and thus the same necessitates an amendment of the plaint even in respect of the said averments and, therefore, the present chamber summons be allowed and amendment should be permitted to be carried out.

8. In so far as law is concerned, the learned counsel for the plaintiff Mr. Kadam has contended that it is now settled law that the amendment of the plaint under order 6 rule 17 should be generously granted and the Court must take broader view of the matter and should not non-suit a party by refusing to grant amendment of the pleadings. He has further contended that in so far as the merits are concerned, it is open to the defendants to contest the claim by filing the written statement but according to him it is not appropriate at this stage to refuse to grant

amendment so as to shut out the plaintiff from making out any particular case. The learned counsel for the plaintiff has also urged before me that the present amendment application is sought to be moved at the threshold because the defendants have yet not filed written statement to the said suit and, therefore, also the present chamber summons should be made absolute.

9. On the other hand, the learned counsel Mr. Chagla appearing for the proposed defendant no. 2 is concerned, has strenuously opposed the application for amendment of the plaint. He has contended that though it is a normal rule to grant amendment to the pleadings and case of the parties should not be shut out, still the learned counsel has submitted that there are exceptions to the aforesaid rule and in such exceptional circumstances the Court should not grant amendment to the plaint. According to the learned counsel for the proposed defendant no. 2 one of the exception is the question of limitation if it arises ex-facie and needs no evidence. Another exception according to him is that if the proposed amendment seeks to take away a vested right in the other party then such an amendment can not be permitted. He has also contended that there is a third exception to the rule namely, that when a proposed amendment seeks to completely change a cause of action then the Court should not permit such an

amendment to the suit.

10. Mr. Chagla has contended that in the present case out of the aforementioned three exception, the exception that the vested right of the plaintiff ought not to be taken away squarely applies to the facts of the present case and, therefore, the present chamber summons should be rejected. An application is made by the plaintiff under order 14 rule 5 of the Code of Civil Procedure dated 8.12.2004, inter alia raising an issue that whether the suit before the Additional District Judge, Mandleshwar is liable to be stayed under section 10 of the Civil Procedure Code because of the previously instituted suit before this Court. The said application dated 8.12.2004, inter alia raised the issue as under :-

> 1. Whether the suit is liable to be stayed under Section 10 of the Code by reason of the previously instituted suit in Bombay High Court?

According to the learned counsel for the proposed defendant if the amendment as sought for is granted then in that event the proposed defendant no. 2 will be added as the party defendant to the suit as on today but the said amendment will relate back to the date of a suit as originally instituted and thus the present suit by virtue of the amendment to the suit will be

treated as if he was always a party defendant to the suit. In view thereof, according to the learned counsel for the proposed defendant, the proposed amendment ought not to be granted as it is likely to take away vested right in the proposed defendant. The second but more important contention raised by the learned counsel for the proposed defendant no. 2 is that whether a vested right in the form of an admission in the plaint can be taken away by carrying out an amendment in the present case. According to the learned counsel for the defendant, in paragraphs 5, 6 and 22 of the plaint, the plaintiff has unequivocally stated that they are using the mark "Manikchand" in respect of tobacco products right from 1961. Thus, according to the learned counsel for the proposed defendant no. 2, it is an admission on the part of the plaintiff that they have been using the mark "Manikchand" from 1961 and not prior thereto. According to the learned counsel for the proposed defendant no. 2, if the amendment is permitted and the plaintiffs are allowed to change the case that they are in use of the trade mark from 1958 and not from 1961, then the same would take away a vested right of the plaintiff to contend that the proposed defendant no. 2 who are using the mark from 1958 onwards are the prior user in respect of the said trade mark "Manikchand". The learned counsel has also drawn my attention to the written statement which has been filed by the plaintiff in the District Court at Mandleshwar, particularly

paragraph 39 of the said written statement in which also the defendant has inter alia admitted that they have produced the material to prove that they are manufacturing and selling the product under the trade mark "Manikchand" since 1961. The learned counsel for the proposed defendant no.2 has also drawn my attention to the plaint which has been filed in Mandleshwar Court in which it is inter alia stated by the proposed defendant no. 2 that they are in use of the trade mark since 1959 and has contended that thus they have right of prior user of the said trade mark. According to the learned counsel if an amendment is allowed then plaintiff would be hampered and/or their right to claim prior user would be taken away. Thus it is contended that an amendment in terms of paragraphs 5 and 6 of the Schedule to the Chamber Summons should not be permitted at all.

11. Mr. Virendra Tulzapurkar, the learned Sr. counsel appearing for the defendants has also vehemently contended that the said chamber summons should be dismissed. He has contended that if the right of the trade mark is already assigned in favour of the proposed defendant no. 2 and on that basis if the plaintiffs are seeking to amend the plaint, then, as a necessary corollary they must delete the defendant from the arena of the parties to the suit and the defendant should not be dragged into the controversy of

the present suit. He has further contended that it is not open for the plaintiff to maintain the suit on the same cause of action against the defendant and the proposed defendant and, therefore, also the chamber summons should not be granted in favour of the plaintiff herein. He has further contended that the plaintiffs were fully aware of the fact that the right, title and interest in the trade mark "MANIKCHAND" has been duly assigned in favour of the proposed defendant and inspite of being aware of the said fact the plaintiffs have filed a frivolous suit only against this defendant and, therefore, the prayer to amend the suit by now adding the proposed defendant no. 2 should not be granted and ought to be rejected. He has further contended that if plaintiff wants to prosecute suit against proposed defendant no. 2 then it is open to them to file a separate suit and therefore this amendment should not be granted.

12. Both, Mr. Chagla and Mr. Tulzapurkar has also placed reliance upon Section 34 of the Trade Marks Act, 1999, which inter alia reads as under :-

> "34. Saving for vested rights.- Nothing in this Act shall entitle the proprietor or a registered user of registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods or

services in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior--

(a) to the use of the first-mentioned trade mark in relation to those goods or services by the proprietor or a predecessor in title of his; or

(b) to the date of registration of the first-mentioned trade mark in respect of those goods or services in the name of the proprietor of a predecessor in title of his,

Whichever is the earlier, and the Registrar shall not refuse (on such use being proved) to register the second mentioned trade mark by reason only of the registration of the first-mentinoed trade mark."

13. In support of the aforesaid contention, the learned counsel has drawn my attention to various judgements of the Apex Court as under:

14. Firstly, the learned counsel has drawn my attention to the judgment of the Apex court in the case of M/s. Modi Spinning & Weaving Mills Co. Ltd., and Another, vs. M/s. Ladha Ram & Co., reported in (1976)

4 SCC 320, particularly paragraph 7 and 9 of the said judgment which read as under :-

> "7. The trial Court rejected the application of the defendants for amendment. One of the reasons given by the trial Court is that the defendants wanted to resile from admissions made in paragraph 25 of the written statement. The trial Court said that "the repudiation of the clear admission is motivated to deprive the plaintiff of the valuable right accrued to him and it is against law". The trial Court held the application for amendment to be not bona fide."
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> "9. The decision of the trial Court is correct. The defendants cannot be allowed to change completely the case made in paragraph 25 and 26 of the written statement and substitute an entirely different and new case."

15. Thereafter the learned counsel has drawn my attention to the judgment of the Apex Court in the case of Heralal vs. Kalyan Mal and others, reported in (1998) 1 SCC 278, particularly paragraph 9 of the said judgment which reads as under :-

"9. Now it is easy to visualize on the facts before this Court in the said case that the defendant did not seek to go behind his admission that there was an agreement of 25-1-1991 between the parties but the nature of the agreement was sought to be explained by him by amending the written statement by submitting that it was not an agreement of sale as such but it was an agreement for development of land. The facts of the present case are entirely different and consequently the said decision also cannot be of any help for the learned counsel for the respondents. Even that apart, the said decision of two learned Judges of this Court runs counter to a decision of a Bench of three learned Judges of this Court in the case of Modi Spg. & Wvg. Mills Co. Ltd. v. Ladha Ram & Co. In that case, Ray, C.J., speaking for the Bench had to consider the question whether the defendant can be allowed to amend his written statement by taking an inconsistent plea as compared to the earlier plea which contained an admission in favour of the plaintiff. It was held that such an inconsistent plea which would displace the plaintiff completely from the admissions made by the defendants in the written statement cannot

be allowed. If such amendments are allowed in the written statement the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In that case a suit was filed by the plaintiff for claiming a decree for Rs. 1,30,000 against the defendants. The defendants in their written statement admitted that by virtue of an agreement dated 7-4-1967 the plaintiff worked as their stockist-cum-distributor. After three years the defendants by application under Order VI Rule 17 sought amendment of written statement by substituting paras 25 and 26 with a new paragraph in which they took the fresh plea that the plaintiff was mercantile agent cum purchaser, meaning thereby they sought to go behind their earlier admission that the plaintiff was stockist-cum-distributor. Such amendment was rejected by the trial court and the said rejection was affirmed by the High Court in revision. The said decision of the High Court was upheld by this Court by observing as aforesaid. This decision of a Bench of three learned Judges of this Court is a clear authority for the proposition that once the written statement contains an admission in favour of the

plaintiff, by amendment such admission of the defendants cannot be allowed to be withdrawn if such withdrawal would amount to totally displacing the cause of the plaintiff and which would cause him irretrievable prejudice. Unfortunately the aforesaid decision of the three-member Bench of this Court was not brought to the notice of the Bench of two learned Judges that decided the case in Akshaya Restaurant. In the latter case it was observed by the Bench of two learned Judges that it was settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. The aforesaid observations in the decision in Akshaya Restaurant proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However the aforesaid decision of the three-member Bench of this Court in Modi Spg. is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiff’s case and cause him irretrievable prejudice."

16. The learned counsel has drawn my attention

to the judgment of the Apex Court in the case of Estralla Rubber vs. Dass Estate (P) Ltd., reported in (2001) 8 SCC 97, particularly paragraph 8 of the judgment which reads as under :-

> "8. It is fairly settled in law that the amendment of pleadings under Order 6 Rule 17 is to be allowed if such an amendment is required for proper and effective adjudication of controversy between the parties and to avoid multiplicity of judicial proceedings, subject to certain conditions such as allowing the amendment should not result in injustice to the other side; normally a clear admission made conferring certain right on a plaintiff is not allowed to be withdrawn by way of amendment by a defendant resulting in prejudice to such a right of the plaintiff, depending on the facts and circumstances of a given case. In certain situations, a time-barred claim cannot be allowed to be raised by proposing an amendment to take away the valuable accrued right of a party. However, mere delay in making an amendment application itself is not enough to refuse amendment, as the delay can be compensated in terms of money. Amendment is to be allowed when it does not cause serious

prejudice to the opposite side. This Court in a recent judgment in B.K. Narayana Pillai v. Parameswaran Pillai after referring to a number of decisions, in para 3 has stated, thus: (SCC p. 715).

"3. The purpose and object of Order 6 Rule 17 CPC is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interests of justice on the basis of guidelines laid down by various High Courts and this Court. It is true that the amendment cannot be claimed as a matter of right and under all circumstances. But it is equally true that the courts while deciding such prayers should not adopt a hypertechnical approach. Liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties. Amendments are allowed in the pleadings to avoid uncalled-for multiplicity of litigation."

In para 4 of the same judgment this Court has quoted the following passage from the judgment in A.K. Gupta and Sons Ltd. v. Damodar Valley Corpn. (AIR pp.97-98, para 70

"The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon v. Neal. But it is also well recognized that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or

additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: See Charan Das v. Amir Khan and L.J. Leach and Co. Ltd., v. Jardine Skinner and Co."

This Court in the same judgment further observed that the principles applicable to the amendment of the plaint are equally applicable to the amendment of the written statement and that the courts are more generous to allowing amendment of the written statement as the question of prejudice is less likely to operate in that event. It is further stated that the defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice and that any admission made in favour of the plaintiff conferring right on him is not withdrawn.'

17. The learned counsel has thereafter relied upon a judgment of the Apex Court in the case of B.K. Narayana Pillai vs. Parameshwaran Pillai and Another, reported in (2000) 1 SCC 712, particularly paragraph 4 of the said judgment which reads as under :-

"4. This Court in A.K. Gupta & Sons Ltd., vs. Damodar Valley Corpn. held :

"The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon v. Neal. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation: See Charan Das v. Amir Khan and L.J. Leach and Co. Ltd., v. Jardine Skinner and Co.

The principal reasons that have led to the rule last mentioned are, first, that the object of courts and rules of procedure is to decide the rights of the parties and not to punish them for their mistakes (Cropper v. Smith) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended .(Kisandas Rupchand v. Rachappa Vithoba Shilwani approved in Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil).

The expression 'cause of action' in the present context does not mean 'every fact which it is material to be proved to entitle the plaintiff to succeed' as was said in Cooke v. Gill in a different context, for if it were so, no material fact could ever be amended or added and, of course, no one would want to change or add an immaterial allegation by amendment. That expression for the present purpose only means, a new claim made on a new basis constituted by new facts. Such a view was taken in Robinson v. Unicos Property Corpn. Ltd. and it seems to us to be the only possible view to take. Any other view would make the rule futile. The words 'new case' have been understood to mean 'new set of ideas' : Dornan v. J.W. Ellis and Co. Ltd. This also seems to us to be a reasonable view to take. No amendment will be allowed to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time."

Again in Ganga Bai v. Vijay Kumar this Court held : (SCC p. 399, para 22)

"The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such far-reaching discretionary powers is governed by judicial considerations and wider the discretion, greater ought to be the care and circumspection on the part of the court."

In Ganesh Trading Co. v. Moji Ram it was held: SCC p. 93, para 4

"4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings, subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its omissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."

The principles applicable to the amendments of the plaint are equally applicable to the amendments of the written statements. The courts are more generous in allowing the amendment of the written statement as the question of prejudice is less likely to

operate in that event. The defendant has a right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to injustice and that any admission made in favour of the plaintiff is not withdrawn. All amendments of the pleadings should be allowed which are necessary for determination of the real controversies in the suit provided the proposed amendment does not alter or substitute a new cause of action on the basis of which the original lis was raised or defence taken. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts should not be allowed to be incorporated by means of amendment to the pleadings. Proposed amendment should not cause such prejudice to the to her side which cannot be compensated by costs. No amendment should be allowed which amounts to or relates (sic results) in defeating a legal right accruing to the opposite party on account of lapse of time. The delay in fling the petition for amendment of the pleadings should be properly compensated by costs and error or mistake which, if not fraudulent, should not

be made a ground for rejecting the application for amendment of plaint or written statement."

By relying upon the aforesaid judgments, the learned counsel has vehemently contended that it is the settled law that vested right which has accrued by virtue of the pleadings and that the stand cannot be taken away by permitting and granting the amendment to the averments made in that behalf. The learned counsel has contended that in the plaint as it stands it is admitted that the user of the trade mark of the plaintiff has been since 1958 and the proposed defendant no. 2 having claimed the said user from 1959, they are the prior user of the trade mark and not the plaintiff herein. It has been contended that the amendment proposed is deliberate and misconceived in as much as it seeks to defeat such a vested right in the proposed defendant no. 2 by virtue of altering the case of user of the said trade mark "Manikchand" from 1961 to 1958. The learned counsel for the defendant and the proposed defendant contended that the said amendment ought not to be granted by this Court. In any event, it has been submitted that this Court should not grant the amendment as contained in paragraphs 5 and 6 of the Schedule to the Chamber Summons even if the Court is inclined to pass the order in respect of the other paragraphs of the schedule to the chamber summons proposing to make various other amendments to

the suit. The learned counsel or the plaintiffs in rebuttal to the aforesaid contention has contended that there is neither any admission on the part of the plaintiffs that they are using the mark since 1961 nor the aforesaid judgment has any application to the facts of the present case. According to him, the admission of the averments can only be in the written statement and cannot be in the plaint at all. It has been further contended that it is merely a plea that they are using from 1958 and the same has to be subject to being establishing on the material and evidence produced in trial of the suit. Merely because the evidence of the user of the mark "Manikchand" was found subsequently the amendment on the said basis cannot be rejected by this Court.

18. I have heard the learned counsel for the parties at length. Though the application is merely for an amendment of the pleadings under order 6 rule 17 of the Code of Civil Procedure it is supported by catena of decisions of the Supreme Court. The Apex Court has time and again held that the amendment should be permitted unless the compensation by way of costs is not an adequate measure. In so far as the first contention of the learned counsel for the proposed defendant is concerned, which is pertaining to Section 10 of the Civil Procedure Code, I am of the opinion that the said contention must not detain me at all because under section 21 of the Limitation Act it is

settled law that the suit as against a particular defendant is deemed to have been instituted as on the date on which the amendment is granted and proposed defendant is added. The said section 21 of the Limitation Act reads as under :-

> "21. Effect of substituting or adding new plaintiff or defendant.--(1) Where after the institution of a suit, a new plaintiff or, defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party.
>
> Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.
>
> (2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff."

19. Firstly I am not inclined to accept the contention because the question whether the suit instituted against the proposed defendant no. 2 would be as on the date of the filing of the suit or as on the date of grant of an amendment would not arise in light of section 21 of the Limitation Act. I am also of the further opinion that the said contention raised by Mr. Chagla has no merits because merely an issue pertaining to section 10 of the Civil Procedure Code is required to be determined, the amendment under Order 6 rule 17 ought to be rejected. In view of the above, in so far as this contention of Mr. Chagla is concerned, I reject the same as I find no merit therein.

20. In so far as the second contention raised both by Mr. Chagla and Mr. Tulzapurkar is concerned, I find considerable merit in that contention. Firstly because of provisions of section 34 of the Trade Marks Act, 1999 which gives a specific right in favour of a person who is prior user of the trade mark. It is undoubtedly true that the plaintiffs have by making averments in the plaint as made in paragraphs 5, 6 and 22 of the plaint has admitted that the user of the trade mark "Manikchand" in respect of the tobacco product was only from 1961. Once the said averment is made, it is not open for the plaintiff to go back on the said averment and thereafter now contend that it is

not from 1961 but much prior thereto. In my view, this is significant because the proposed defendant no. 2 in a suit filed in District Court, Mandaleshwar, in State of Madhya Pradesh has specifically made a plea that the user by them is from 1959 i.e. prior in point of time than the user by the plaintiff herein. In light of the averments made by the proposed defendant no. 2, the plaintiffs in the present case are seeking to amend the suit by going further back in time to 1958. I am not inclined to grant such an amendment in favour of the plaintiffs in view of the admission on the part of the plaintiffs that they are using the mark from 1961. The contention of the learned counsel for the plaintiffs, that the plaint never contain an admission of the fact it is only the written statement which can be treated as containing any admission of any of the particular fact, I am not inclined to accept the same. The statement made in the plaint on oath is the statement on solemn affirmation and it is treated as a statement of fact which is an admission of the particular set of facts the plaintiff in the plaint and it is this case which is required to be proved by the plaintiff at the trial of the suit and the defendants are required to meet. Once I permit substitution of the paragraph which contains admission that the user of the mark was from 1961 then obviously the plaintiff will be entitled to go back to 1958 and defeat the right which is created in favour of the proposed defendant no. 2 to contend that they are prior user of the mark in point

of time. This right is a legal right vested under section 34 of the Trade Marks Act, 1999. In view thereof, if I grant permission to add paragraphs as prayed in the schedule to the chamber summons would deprivate the right of the defendant and prejudicially affect the interest of the defendant as well as the proposed defendant and in view thereof, I am of the opinion that the plaintiff cannot be permitted to amend the chamber summons as set out in the schedule thereto in so far as paragraphs 5 and 6 thereof are concerned. I am also of the opinion that the judgment cited by Mr. Chagala, the learned counsel for the proposed defendant no. 2 has also taken similar view while holding that one of the exception to the general rule to grant liberty the amendment is that the party against whom such an amendment is granted ought not to be irretrievably prejudicially affected. In that view of the matter, I am of the opinion that paragraphs 5 and 6 to the schedule to the chamber summons cannot be permitted and, therefore, I am not inclined to permit the amendment of the plaint in so far as paragraphs 5 and 6 to the schedule to the chamber summons is concerned.

21. In light of the aforesaid facts, I pass the following order.

> The Chamber Summons is made absolute in terms of prayer clause (a) excluding

paragraphs 5 and 6 of the schedule to the chamber summons which is bracketed in read. Amendment to be carried out within a period of 2 weeks from today.

22. Chamber summons disposed of accordingly. However, there shall be no order as to costs.